3-21-2013

State v. Paulk Respondent's Brief Dckt. 39534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 39534
Plaintiff-Respondent,	)	
	)	Bonneville Co. Case No.
vs.	)	CR-2011-3385
	)	
THOMAS ZACHARY ALEC PAULK,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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Nature of the Case

This matter is on appeal from a judgment of conviction upon a jury's verdict finding Thomas Zachary Alec Paulk guilty of forcible sexual penetration by use of a foreign object. Paulk argues the district court abused its discretion by allowing an out-of-court statement by the victim into evidence. Paulk also contends the statement's admission violated his Sixth Amendment right to confrontation. Finally, Paulk argues the district court abused its discretion by imposing an excessive sentence and denying his Rule 35 motion to reduce that sentence.

Statement of Facts and Course of Proceedings

The state charged Thomas Zachary Alec Paulk with forcible sexual penetration by use of a foreign object.[1] (R., pp. 23-24.) The victim is L.B., the then-two year-old daughter of Paulk's girlfriend at the time, Nicole Orme. (PSI, p. 2.) Paulk and Orme lived together with Orme's two daughters from a prior marriage – L.B. and then-five year-old K.B. – and also Paulk and Orme's son, M.P., who was then nine months old. (9/13/11 Tr., p. 239, L. 15 – p. 240, L. 5; PSI, p. 14.)

[1] Paulk was also charged with, and found guilty of, lewd and lascivious conduct; this conviction was later dismissed pursuant to the state's motion based on the psychosexual evaluation which showed Paulk acted with intent to injure the child, but not with sexual intent, when he forcefully thrust his finger into the child's vagina. (R., pp. 121-22, 124.)

On the evening at issue, Orme left Paulk with the children, and went to pick up dinner. (PSI, p. 2; 9/13/11 Tr. p. 241, L. 19 – p. 242, L. 1.) Sometime after Orme left, Paulk became frustrated while changing L.B.'s diaper and inflicted a serious injury to L.B.'s vaginal area. (PSI, p. 2.) Paulk called Orme, telling her to come home because L.B. was bleeding. (PSI, p. 2; Tr., p. 242, L. 7 – p. 243, L. 23.) Orme returned home, and after seeing L.B.'s injury, brought her to the Mountain View Hospital Ready Care.[2] (PSI, p. 2; State's Exhibit 6.) The intake staff-person, Melissa Boyce,[3] asked L.B., "Did you get an owie?"; L.B. responded, "Zackie did it, to me." (9/7/11 Tr., p. 206, Ls. 12-13.)

The doctor sent L.B. into surgery at the Eastern Idaho Regional Medical Center (EIRMC), and notified police. (PSI, p. 2.) Law enforcement interviewed Orme at the EIRMC, and went to interview Paulk at home. (PSI, p. 2; State's Exhibit 7.) Paulk's initial story conflicted with Orme's; when confronted with this, Paulk admitted his lie, and said he had hurt L.B. on accident when his knee buckled due to a recent surgery. (PSI, p. 2.)

Officers found semen on the bed near a blood stain where Paulk said he had changed L.B.'s diaper. (PSI, p. 2.) When asked about it, Paulk disclosed that he had masturbated in the bathroom earlier, and probably wiped his hand on the bed. (PSI, p. 2.) Police arrested Paulk. (PSI, p. 2.) Upon arrest, Paulk admitted that he had gotten frustrated with L.B. crying about her bottom hurting,

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[2] State's Exhibit 6 shows the spelling Mountain View Hospital "Redicare"; however the facility is spelled "Ready Care" throughout the record.

[3] Boyce happened to be L.B.'s aunt through Orme's previous marriage, but testified that she did not know L.B. well. (9/7/11 Tr., p. 201, Ls. 15-24; 9/13/11 Tr., p. 296, Ls. 7-8.)

so he put his finger inside her and pushed down hard, causing the injury. (PSI, p. 2.)

The state moved for a pre-trial determination on the admissibility of L.B.'s statement to Melissa Boyce at the hospital. (R., p. 58.) After a hearing at which the district court took testimony and heard arguments (see 9/7/11 Tr.), the court granted the state's motion (R., pp. 60-62).

At the conclusion of trial, a jury found Paulk guilty of forcible sexual penetration by a foreign object. (R., pp. 80-81.) The district court sentenced Paulk to a term of 15 years with five years fixed. (R., pp. 131-32.) Paulk filed a Rule 35 motion to reduce his sentence (Supp. R., p. 11), which the district court denied (Supp. R., p. 28). Paulk timely appeals. (R., pp. 93-100; Supp. R., pp. 30-33.)

ISSUES

Thomas Zachary Alec Paulk states the issues on appeal as:

1. Did the district court abuse its discretion when it admitted an out-of-court statement by the victim based on its conclusion that the statement was both an excited utterance and a statement made for purposes of medical diagnosis or treatment?

2. Even assuming that the out-of-court statement of the victim was not inadmissible hearsay, did the district court violate Mr. Paulk's rights under the Sixth Amendment's Confrontation Clause when it admitted the statement over his objection?

3. Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with five years fixed, following Mr. Paulk's conviction for forcible sexual penetration with a foreign object?

4. Did the district court abuse its discretion when it denied Mr. Paulk's Rule 35 motion in light of the new information provided, namely, that, since he was sentenced he has been the victim of threats and physical attack due to the nature of his conviction?

(Appellant's brief, p. 6.)

The state rephrases the issues as:

1. Has Paulk failed to show the district court abused its discretion in admitting the victim's out-of-court statement because the record and applicable law support the district court's reasonable determination that exceptions to hearsay applied?

2. Do the record and case law support that Paulk's right to confrontation was not violated, or that any violation of his right to confrontation was harmless error?

3. Has Paulk failed to show the district court abused its discretion in sentencing him to 15 years with five years fixed for forcible sexual penetration with a foreign object?

4. Has Paulk failed to show the district court abused its discretion in denying his Rule 35 motion based on evidence he has been threatened and a suggestion he might not receive tailored treatment?

ARGUMENT

I.
Paulk Has Failed To Show The District Court Abused Its Discretion In Admitting The Victim's Out-Of-Court Statement Because The Record And Applicable Law Support The District Court's Reasonable Determination That Exceptions To Hearsay Applied

A. Introduction

Paulk argues the district court abused its discretion in admitting L.B.'s hearsay statement to hospital staff. (Appellant's brief, pp. 7-14.) According to Paulk, Idaho law does not support that L.B.'s statements fell within the excited utterance or medical diagnosis exceptions on which the district court's ruling was based. Paulk's argument misapplies Idaho law.

B. Standard Of Review

A district court's decision whether to admit evidence is reviewed for abuse of discretion. State v. Thorngren, 149 Idaho 729, 731, 240 P.3d 575, 577 (2010) (citation omitted). For this analysis, the appellate court considers whether the district court: (1) understood the issue was discretionary; (2) acted within its scope of discretion and consistent with applicable legal standards; and (3) made its decision through exercise of reason. Id. at 732, 240 P.3d at 578.

C. Excited Utterance Exception Applied

Generally, hearsay – statements not made by a declarant testifying at trial, and made to prove the truth of the matter asserted – are inadmissible in court. I.R.E. 801(c), 802. However, Rule 803(2) authorizes the admission of hearsay that is an "excited utterance," or a statement "relating to a startling event

. . . made while the declarant was under the stress of excitement caused by the event." I.R.E. 803(2).

For this exception to apply, the trial court must find: (1) an occurrence "sufficiently startling to render inoperative the normal reflective thought processes of an observer"; and (2) that the statement was "a spontaneous reaction to the occurrence or event and not the result of reflective thought." State v. Parker, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986) (quoting E. Cleary, McCORMICK ON EVIDENCE, § 297 (3d ed. 1984)); State v. Kay, 129 Idaho 507, 516-17, 927 P.2d 897, 906-07 (Ct. App. 1996). Where the evidence sufficiently supports these "foundational requisites," admission of the excited utterance "is left to the sound discretion of the trial court." State v. Bingham, 116 Idaho 415, 421, 776 P.2d 424, 430 (1989).

In exercising its discretion, the trial court "reviews the totality of the circumstances, including the nature of the startling event and the demeanor of the declarant when making the statement." Kay, 129 Idaho at 517, 927 P.2d at 907. This includes consideration of the declarant's age, and whether the statement was self-serving. Id.

Arguing that the excited utterance exception does not apply, Paulk highlights that L.B. was not crying. (Appellant's brief, p. 13.) This argument is unavailing, given Idaho case law. In State v. Kay, the Idaho Court of Appeals considered an out-of-court statement by a four year-old victim of sex abuse, hours after the alleged abuse. 129 Idaho 507, 927 P.2d 897. The Kay court found the declarant child's calm exterior did not render the excited utterance

exception inapplicable. Id. at 517, 927 P.2d at 907. Rather, the trial court properly found the child's behavior – curling up next to and hanging onto her mother – was evidence she was "bottling up" emotions, as the Idaho Supreme Court discussed in State v. Parker, 112 Idaho at 4, 730 P.2d at 924. Kay, 129 Idaho at 517, 927 P.2d at 907.

In Parker, the court considered an out-of-court statement by a 14 year-old rape victim. Parker, 112 Idaho 1, 730 P.2d 921. The court noted that "[i]n sex crimes, the excited utterance exception often receives broader application," and the "tendency to admit such statements, even when made hours after the event, probably lies in their high probative value." Id. at 4, 730 P.2d at 924. The court concluded the victim's statement, recorded two to three hours after the alleged rape, satisfied the excited utterance exception. Id. In Parker, as in Kay, the court found no abuse of discretion by the trial court below. Parker, 112 Idaho at 4, 730 P.2d at 924; Kay, 129 Idaho at 517, 927 P.2d at 907.

Paulk also cites the time lapse from the startling event to the time of L.B.'s statement. (Appellant's brief, pp. 13-14.) As already mentioned, in both Parker and Kay, hours had passed between the declarants' sexual assault and statement. Parker, 112 Idaho at 4, 730 P.2d at 924; Kay, 129 Idaho at 517, 927 P.2d at 907. Thus, the timing here – less than two hours between L.B.'s assault and statement, does not support abuse of discretion by the trial court in applying the excited utterance exception.

Examining the circumstances here, L.B.'s age militates against her statements being the result of reflective thought. The record shows that L.B.,

like in Kay, exhibited signs of bottling up, in that she was clinging to her mother and wanting to sit in her lap, where L.B. would normally be running around, playing. (9/7/11 Tr., p. 192, Ls. 5-9.) Notably, there is no evidence Melissa Boyce prompted L.B. to identify a perpetrator, or that she otherwise prompted L.B.'s statement; she simply asked, "Did you get an owie?" (9/7/11 Tr., p. 206, Ls. 12-13.) Given Idaho case law, the totality of circumstances supports that the excited utterance exception applied. Paulk has thus failed to show the district court abused its discretion in admitting L.B.'s statement under this exception.

D. Exception For Statements Made For Medical Diagnosis Or Treatment Applies

Rule 803(4) allows the admission of hearsay statements made "for purposes of medical diagnosis or treatment." I.R.E 803(4). Under the explicit language of the rule, a proponent of the evidence offered must show: (1) that the statements were "made for purposes of medical diagnosis or treatment"; (2) that the statements described "medical history, or past or present symptoms, pain, or sensations, or the source thereof"; and (3) that the statements were "reasonably pertinent to diagnosis or treatment." I.R.E. 803(4); Kay, 129 Idaho at 518, 927 P.2d at 908.

In considering whether this exception applies, the court must look to the totality of the circumstances, including: the child's age; whether the child generally understood the medical provider's role; whether the child was in pain or distress; any undue influence, such as leading questions; whether the child understood the need to be truthful to the medical provider; whether there was an ongoing custody dispute; the child's ability and willingness to communicate; the

child's ability to differentiate between truth and fantasy; and whether the examination was conducted for purposes of litigation rather than treatment. Kay, 129 Idaho at 518, 927 P.2d at 908.

Considering the factors identified in Kay, the circumstances here support that L.B.'s statement falls within the exception. There was no custody dispute clouding L.B.'s motivation; at the time of the examination, L.B.'s mother was entirely supportive of Paulk. (9/13/11 Tr., p. 255, L. 21 – p. 256, L. 1.) The record supports that L.B. was experiencing pain and discomfort, given the extent of the injury and her need for surgery to repair the damage to her vagina. (9/13/11 Tr., p. 253, Ls. 19-20; p. 254, Ls. 2-14 (L.B. cried during doctor's exam, after Melissa Boyce's intake exam); p. 361, Ls. 9-21 (extent of injury required surgery).) There is nothing in the record to support that L.B. did not understand why she was at the hospital, or that she was confused as to truth or fantasy.

In State v. Nelson, a 10 year-old victim of sexual assault was taken to the emergency room within an hour of her assault; the defendant sought to exclude her examination, arguing it was "for purposes of discovering evidence to corroborate her allegations of sexual abuse." 131 Idaho 210, 216, 953 P.2d 650, 656 (Ct. App. 1998). The court in Nelson found the medical treatment exception applied, stating, "On this record there is no basis to infer that the declarant . . . believed she was seeing the doctor for any reason other than diagnosis and treatment." Id. Here, there is even less reason to believe L.B.'s examination by Melissa Boyce was anything other than for diagnosis and treatment, as there was no allegation of abuse when that intake examination began.

In arguing abuse of discretion, Paulk claims the district court erroneously concluded that "the motivation of the questioner is the key in determining whether 803(4) is satisfied." (Appellant's brief, p. 11.) The motivation of the questioner *is* pertinent as to the purpose of the exam. Nelson, 131 Idaho at 216, 953 P.2d at 656. Here, the record reveals the district court's findings were not limited to this inquiry; the district court addressed that the child was experiencing pain, and noted the lack of evidence to suggest her statement was self-serving. (9/7/11 Tr., p. 229, Ls. 11-16; p. 230, Ls. 14-17.) Given the district court's thorough evaluation of the facts before it, Paulk has failed to show an abuse of discretion in finding the medical diagnosis exception applied. However, as discussed in the next section, the state also asserts that any error by the district court was harmless.

II.
The Record And Case Law Support That Paulk's Right To Confrontation Was Not Violated, Or That Any Violation Of His Right To Confrontation Was Harmless Error

A. Introduction

Paulk contends his Sixth Amendment right to confrontation was violated when the district court allowed into evidence L.B.'s statement to hospital staff. (Appellant's brief, pp. 14-21.) Again, Paulk misapplies applicable law. Further, even if this Court finds the Confrontation Clause was violated, the district court's error was harmless.

B. Standard Of Review

When a party asserts a constitutional violation, the court on appeal will defer to the trial court's factual findings unless they are clearly erroneous. State v. Shackelford, 150 Idaho 355, 372, 247 P.3d 582, 599 (2010) (citation omitted). The appellate court exercises free review over the question whether constitutional requirements were satisfied, given those factual findings. Id. Here, whether the admission of L.B.'s statements violated Paulk's Sixth Amendment right to confront a witness is a legal question over which the Court exercises free review. Id.

C. Paulk's Right To Confrontation Was Not Violated Because L.B.'s Statement Was Not Testimonial

The Confrontation Clause of the Sixth Amendment is implicated where a witness's statement is testimonial in nature, the witness is unavailable for trial, and the defendant had no prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 68 (2004). Given L.B.'s very young age, the sole issue here is whether L.B.'s statement to Melissa Boyce was testimonial. To determine whether a disputed statement was testimonial, the court considers the purpose of the questioner who elicited the challenged statement. Shackelford, 150 Idaho at 373, 247 P.3d at 600 (citing State v. Hooper, 145 Idaho 139, 143-44, 176 P.3d 911, 915-16 (2007)). The court also considers the formality of the questioning. Id. (citing Hooper 145 Idaho at 144–45, 176 P.3d at 916–17).

In Shackelford, the Idaho Supreme Court found that the statement in question was not testimonial where the purpose of the interrogation that elicited

the statement was not "to establish or prove past events," but to show demeanor. 150 Idaho at 373, 247 P.3d at 600. In another case, the Idaho Supreme Court found that evidence was testimonial and thus in violation of the Confrontation Clause where "the primary purpose of the interview was to establish or prove past events potentially relevant to later criminal prosecution, as opposed to meeting the child's medical needs." Hooper, 145 Idaho at 145-46, 176 P.3d at 917-18. The court noted that the interviewer did not inquire about the child's medical condition. Id. at 146, 176 P.3d at 918.

Here, the purpose of Melissa Boyce's question (and L.B.'s response) was not to establish or prove past events, but to meet L.B.'s medical needs; as intake staff, Boyce's role was to gather information to assist the doctor or provider in starting treatment. (9/7/11 Tr., p. 203, L. 25 – p. 204, L. 9; p. 206, Ls. 23-25; p. 207, Ls. 10-11; p. 208, Ls. 1-5.) The fact that intake staff are also mandatory reporters of child abuse does not eclipse the purpose of the intake staff's initial assessment. (9/7/11 Tr., p. 212, L. 19 – p. 213, L. 12.) Boyce's responses to counsel's inquiry on that point are more demonstrative of rigorous cross-examination than of confusion over the initial assessment's purpose. Given the evidence regarding the purpose of L.B.'s initial assessment, L.B.'s statement was non-testimonial, and thus did not violate Paulk's right to confrontation.

D. Even If The Court Finds That The Confrontation Clause Was Violated, Admission Of L.B.'s Statement Was Harmless Error

The court in Hooper considered whether admission of testimonial statements in violation of the Confrontation Clause was harmless error. An appellate court can find a constitutional error harmless on determination "beyond

a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." Hooper, 145 Idaho at 146, 176 P.3d at 918. In that case, the court noted that the "child's testimony was essential" and that "much of the physical evidence was inconclusive." Id. The court thus concluded that the trial court's error in admitting the statements was harmless. Id.

In this case, the evidence against Paulk was staggering. The doctor who observed and treated L.B. at the Ready Care, and then who performed L.B.'s surgery after she was transferred to EIRMC, was Jonathan Kent McGregor, D.O. (9/14/11 Tr., p. 339, Ls. 14-15; p. 349, Ls. 1-24; p. 350, Ls. 4-11, 17-21; p. 371, Ls. 10-12.) Photographs that Dr. McGregor took of L.B.'s injuries, as well as a photograph taken post-surgery, were admitted as Exhibits 8 – 11. (9/14/11 Tr., p. 351, L. 22 – p. 352, L. 1; p. 417, L. 20.)

About L.B.'s injuries, Dr. McGregor testified,

> . . . this type of injury is absolutely indicative of a penetrating trauma for the fact that there was no injury to any of the surrounding structures, and the injury extended so far up into the vagina that there was nothing but a penetration that could have caused that kind of extension into the vagina. And just from the tearing, something had to be penetrated with a lot of force. There had to be quite an exertion of force placed on whatever was penetrated into the vagina.

(9/14/11 Tr., p. 364, Ls. 15-24.) As to the possibility of an accident, Dr. McGregor also testified,

> [M]y opinion is that there's no way it could be accidental, because from a fall or something like that . . . you would have injuries in the surrounding tissues around the buttocks, the legs. . . . [W]hen you have an accidental trauma, before there's any injury to the vagina itself, there is going to be injury to the surrounding structures.

(9/14/11 Tr., p. 365, Ls. 4-16.) When asked if he had observed any injuries, bruises, cuts, or anything to L.B.'s legs, buttocks or vulva, the doctor responded, "no," "none." (9/14/11 Tr., p. 359, Ls. 10-21.) "There was no bruising, no scratches[,] no nothing on the surrounding structures in that area." (9/14/11 Tr., p. 368, Ls. 9-10.)

Five year-old K.B., L.B.'s sister, testified that she was at home when L.B. was injured. (9/13/11 Tr., p. 303, Ls. 1-8.) K.B. testified that on that night, she, L.B., Zack (Paulk), and her brother M.P. (less than a year old) were home; her mother (Orme) had gone to get food when L.B. was hurt. (9/13/11 Tr., p. 303, L. 13 – p. 304, L. 20.) Orme's testimony corroborated that, when L.B. suffered her injury, only Paulk and the children were home. (9/13/11 Tr., p. 241, L. 10 – p. 242, L. 14.)

Detective Patrick McKenna, who had conducted much of the investigation in this incident, testified that Paulk changed his story many times during his interview. (9/15/11 Tr., p. 509, L. 18 – p. 510, L. 12; p. 511, L. 21 – p. 512, L. 3; p. 512, Ls. 18-22; p. 513, L. 5 – p. 514, L. 1; p. 515, L. 14 – p. 516, L. 7.) This included the final version, that Paulk had intentionally put his finger in L.B.'s vagina and pushed down hard, causing the damage. (9/15/11 Tr., p. 525, L. 24 – p. 526, L. 2.)

Officer Leendert VanHulten was also part of the team that investigated the incident; his testimony corroborated Detective McKenna's, that Paulk's story changed a number of times. (9/14/11 Tr., p. 462, L. 1-16; p. 462, L. 24 – p. 463, L. 5; p. 463, Ls. 12-17; p. 463, L. 20 – p. 464, L. 1.) This was also corroborated

by Officer Kyle Christopherson. (9/14/11 Tr., p. 479, L. 3 – p. 480, L. 2.) Officer Christopherson testified he heard Paulk say he was upset because L.B. was crying but wouldn't tell him what hurt, "so he began pushing her down on the bed[, a]nd his fingers were going inside of her" out of anger. (9/14/11 Tr., p. 481, Ls. 7-12.) Officer Christopherson then heard Paulk say, "I'm fucked." (9/14/11 Tr., p. 481, L. 14.)

Addressing Paulk's statement to police, the prosecution asked Dr. McGregor if L.B.'s injury was consistent with accidental penetration caused by a knee buckling when changing L.B.'s diaper. (9/14/11 Tr., p. 368, Ls. 12-16.) Dr. McGregor's opinion was that such an explanation was illogical:

> [I]f your knee buckles, to catch yourself . . . you are not going to do this. . . . that's not how I catch myself when I'm falling down. So that kind of scenario does not make any sense to me with this kind of trauma, no.

(9/14/11 Tr., p. 368, Ls. 19-25.)

As to a scenario where L.B. was sliding off the bed during a diaper change (9/14/11 Tr., p. 369, Ls. 1-8), Dr. McGregor also testified that the injury could not have been caused by L.B. falling off and being pushed back up:

> [T]he injury would not have been sustained from that kind of fall. The amount of weight from a little two-year old would not put enough force on catching that child to be able to create this extensive of an injury. It's just not possible.

(9/14/11 Tr., p. 369, Ls. 10-15.)

Finally, the prosecution asked Dr. McGregor if L.B.'s injury could have been caused by one putting fingers inside her vagina and pushing down out of anger because the child was whining and crying during a diaper change. (9/14/11 Tr., p. 369, Ls. 16-20.) Dr. McGregor responded:

> He'd have to push pretty hard, but yeah, I mean that kind of scenario, a purposeful penetration of the vagina could cause this injury, sure. Doesn't seem like a logical way to discipline a two-year old that's crying, but it's possible.

(9/14/11 Tr., p. 369, Ls. 21-25.)

A pediatric forensic nurse, Tara Demkowicz, RN, who is trained as a sexual assault nurse examiner, also observed L.B. at EIRMC, and testified at trial. (9/14/11 Tr., p. 399, L. 12 – p. 401, L. 6; p. 402, Ls. 9-15; p. 414, Ls. 13-24.) Her opinions about the hypothetical causes of L.B.'s injury concurred with those of Dr. McGregor:

- An accidental fall is unlikely given the lack of injury to external or outer vagina, or other parts of L.B.'s body. (9/14/11 Tr., p. 425, Ls. 10-23; p. 429, Ls. 3-13.)
- A knee buckling while changing L.B.'s diaper is not possible given the severity of the damage. (9/14/11 Tr., p. 429, L. 14 – p. 430, L. 10.)
- L.B. sliding off the bed during a diaper change is not possible because her injury was to the anterior rather than posterior aspect; in other words, the injury was not consistent with lifting up, but with pushing down. (9/14/11 Tr., p. 430, L. 11 – p. 431, L. 4.) Also, the injury would not have been so great. (9/14/11 Tr., p. 431, Ls. 5-8.)
- Penetration by a finger "with extreme force and repetitiveness" is possible. (9/14/11 Tr., p. 426, Ls. 22-25.)

Dr. Karen Hansen, a pediatrician and professor of pediatrics, testified she was contacted to give an opinion on what had happened to L.B. (9/15/11 Tr., p. 559, Ls. 15-23.) From information initially presented to her by Orme, Dr. Hansen had "concerns that an accident could have been misinterpreted as sexual abuse" because of how upset people can become about this type of injury. (9/15/11 Tr., p. 561, Ls. 9-12.) But after reviewing the medical record, Dr. Hansen's opinion was consistent with those of Dr. McGregor and RN Demkowicz. (9/15/11 Tr., p.

572, L. 9 – p. 573, L. 25 (knee buckling and sliding off changing area unlikely; consistent with intentional act out of anger or frustration).)

In sum, the evidence overwhelmingly supported the jury's finding that Paulk was guilty of forcible sexual penetration. More damning than the two year-old L.B.'s statement at issue here, was Paulk's ultimate admission to law enforcement that he inflicted the injury out of frustration and anger. Given Paulk's admission and the extensive, unbiased, credible testimony of medical professionals and law enforcement, a jury would have reached the same verdict beyond a reasonable doubt, even without L.B.'s statement. Accordingly, any violation of Paulk's Sixth Amendment right was harmless.

III.
Paulk Has Failed To Show The District Court Abused Its Discretion In Sentencing Him To 15 Years With Five Years Fixed For Forcible Sexual Penetration With A Foreign Object

Paulk argues that the district court abused its discretion in sentencing him to a term of 15 years with five fixed. (Appellant's brief, pp. 21-25.) The appellate court will not disturb a sentence that is within statutory limits absent a showing the court clearly abused its discretion. State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011) (citation omitted). To carry his burden, an appellant must show his sentence is excessive "under any reasonable view of the facts," considering the objectives of criminal punishment: protection of society, deterrence, rehabilitation, and retribution or punishment. Windom, 150 Idaho at 876, 253 P.3d at 313. In reviewing an excessive sentence claim, the appellate court independently reviews the record, examining the nature of the offense, and the offender's character. State v. Delling, 152 Idaho 122, 132, 267 P.3d 709,

719 (2011) (citation omitted). Where reasonable minds could differ as to whether a sentence is excessive, the appellate court will not disturb it. State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (citation omitted).

The parties presented no witnesses at Paulk's sentencing, only argument. In addition to counsels' arguments, the Court considered, among other evidence, the PSI report, Paulk's psychosexual evaluation, and letters from Paulk's family, and also heard from Paulk. (See 4/9/12 Tr.) Of particular concern to the court was Paulk's characterization of the crime as "a complete accident." (4/9/12 Tr., p. 28, Ls. 2; p. 31, L. 23 – p. 32, L. 4.) The crime "was a violent act and a willful act, willful in the sense that it was done out of anger, and it wasn't an accident. It's a tragedy but, again, accident connotates that there wasn't intent, and there was." (4/9/12 Tr., p. 32, Ls. 1-4.)

The district court acknowledged the continuing support of Paulk's parents (4/9/12 Tr., p. 32, Ls. 20-23), Paulk's neurological issues (4/9/12 Tr., p. 33, Ls. 6-18), and Paulk's substance abuse issues (4/9/12 Tr., p. 33, Ls. 18-21). Also, the court expressed its belief "that the act was much more aggressive than you are acknowledging and with much more intent to commit the act," noting that it is the act, and not the result, on which the court's attention is focused. (4/9/12 Tr., p. 34, Ls. 9-13.)

The court specifically identified and commented on the four objectives of punishment: wrongdoing, rehabilitation, protection of society, and deterrence. (4/9/12 Tr., p. 34, Ls. 15-19; p. 35, Ls. 2-22; p. 36, L. 3 – p. 37, L. 16.) The court explained with great care and thoughtfulness, the considerations before it, and

how the facts of this case applied. (Id.) These considerations included the harm toward a very young child, that there were not substantial grounds to justify the criminal conduct, and that the victim was injured through no fault of her own. (4/9/12 Tr., p. 36, Ls. 3-8, 25; p. 37, Ls. 5-6.)

Given all the information before it, the court found the sentence of 15 years with five years fixed appropriate. (4/9/12 Tr., p. 38, Ls. 1-3.) As to Paulk's argument that sending him to prison will make him a criminal, the court said, "Just as you had the ability on that day to make a choice as to whether or not to harm that child, you will have countless other opportunities and choices throughout your incarceration as to whether or not you chose to be rehabilitated or, in your words, become the criminal that you're concerned about by this sentence." (4/9/12 Tr., p. 38, Ls. 5-11.)

Given the egregious nature of the crime, Paulk simply cannot show that the district court's view of the facts was unreasonable, on consideration of the objectives of criminal punishment. See Windom, 150 Idaho at 876, 253 P.3d at 313. Importantly, the record shows the district court considered, and did not ignore, the various mitigating factors presented by Paulk, re-raised on this appeal. (See 4/9/12 Tr.) Even where another reasonable interpretation of the facts exists, at odds with the district court's, Paulk's sentence must not be disturbed on appeal. Miller, 151 Idaho at 834, 264 P.3d at 941. Accordingly, this Court must reject Paulk's argument.

IV.
Paulk Has Failed To Show The District Court Abused Its Discretion In Denying Paulk's Rule 35 Motion Based On Evidence He Has Been Threatened And A Suggestion He Might Not Receive Tailored Treatment

Paulk also asserts that the district court abused its discretion in denying his Rule 35 Motion. (Appellant's brief, pp. 25-27.) In reviewing a district court's denial of a Rule 35 motion, the appellate court applies an abuse of discretion standard. State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008). Again, for such review, the appellate court considers whether the district court (1) was aware its decision was discretionary, (2) acted within the scope of its discretion and consistent with applicable law, and (3) reached its decision through exercise of reason. State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011).

Paulk argues that the district court failed to adequately consider new information presented at the hearing on his Rule 35 motion. (Appellant's brief, pp. 25-27.) That information included that Paulk was threatened with physical harm once incarcerated at the Department of Corrections in Boise, because of the nature of his crime. (9/10/12 Tr., p. 5, L. 22 – p. 6, L. 3.) Also, Paulk's counsel informed the district court that Paulk would not receive neurological counseling – recommended by the psychosexual evaluator – to address violence. (9/10/12 Tr., p. 11, Ls. 6-10.) Rather, defense counsel asserted the available treatment would be that geared toward sex offenders. (9/10/12 Tr., p. 11, Ls. 11-19.) The state responded that there was no evidence the Department of Corrections would not fashion an appropriate treatment. (9/10/12 Tr., p. 22, Ls. 1-7.)

Paulk's psychosexual evaluator determined that Paulk did not commit his crime for purposes of sexual gratification. (9/10/12 Tr., p. 8, Ls. 18-19.) Paulk thus argued incarceration was inappropriate, because it would result in Paulk receiving treatment he does not need, and not receiving treatment he does need. (9/10/12 Tr., p. 11, L. 17 – p. 12, L. 3.) A sentence of supervised probation, Paulk argued, was instead appropriate. (9/10/12 Tr., p. 12, Ls. 4-12.) On appeal, Paulk makes no additional argument, but only reiterates what was raised at hearing on his Rule 35 motion. (Appellant's brief, pp. 25-27.)

Paulk essentially argues he should receive a punishment best-tailored to *his* needs, and not one that might result in Paulk receiving less-than-optimal treatment. At hearing, Paulk invited the district court to ignore completely the extensive injury and on-going harm inflicted upon a two year-old victim with whose care he was entrusted; to ignore retribution; and to take an enormous leap of faith with regard to protecting society and deterring future crime, all in the name of possible rehabilitation. The district court declined to accept that invitation, noting that Paulk's act was "done out of anger," and, despite the evaluator's opinion that it was not done for sexual gratification, it *was* "inserti[on of] a foreign object into the vagina of a child forcibly and violently . . . it was graphic, it was injurious, and it was appalling," thus it was "a deviant sexual act." (9/10/12 Tr., p. 29, Ls. 7-14.)

At hearing, the district court reiterated the four objectives of punishment, highlighting the question of how much to weigh rehabilitation and deterrence. (9/10/12 Tr., p. 31, Ls. 10-16.) Citing Paulk's evaluation report, the district court

found that Paulk was "at high risk of violent recidivism in the future." (9/10/12 Tr., p. 31, Ls. 17-21.) The district court noted that it had considered Paulk's state of mind on the day of the event, and "[v]ery carefully went through, if not all, many of the [probation considerations]." (9/10/12 Tr., p. 32, Ls. 11-14.) Specifically acknowledging the new facts before it, the district court found that a reduced sentence would not fulfill "an appropriate amount of punishment, deterrence, protection of society and rehabilitation." (9/10/12 Tr., p. 32, Ls. 18-25.) Finally, the district court noted that Paulk's sentence is "significantly less than what's available under the statute. It's less than what the state asked for, and I believe it is a fair sentence that accounts for those very things that the defense argues today." (9/10/12 Tr., p. 33, Ls. 2-6.)

Given the district court's careful and thoughtful consideration of the facts and arguments of counsel, there is simply no basis to find it abused its discretion in denying Paulk's Rule 35 motion.

CONCLUSION

The state respectfully requests that the Court affirm the district court's judgment of conviction and sentence.

DATED this 21st day of March, 2013.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of March, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm